

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

---

## **ORDER PO-3133**

Appeal PA11-328

Ministry of Community Safety and Correctional Services

November 9, 2012

**Summary:** The appellants requested records from the ministry relating to the death of their son on the basis of section 21(4)(d) (compassionate reasons). The ministry granted partial access to the responsive records, withholding witness statements and portions of an incident report and police officers' notes on the basis of the discretionary exemption at section 49(a), in conjunction with sections 14(1)(l), 14(2)(a) (discretion to refuse requester's own information/law enforcement), the mandatory exemption at section 21(1) and the discretionary exemption at section 49(b) (personal privacy). A number of issues were resolved during mediation and only the application of sections 21(1) and 49(b) remained to be determined at adjudication. The records all contain the personal information of the deceased and of one or more affected parties. Two records contain the personal information of one of the appellants. In this decision, the adjudicator ordered the disclosure of information pertaining to the deceased and his activities for a specified period of time because the disclosure is desirable for compassionate reasons. The adjudicator upheld the ministry's decision to withhold identifying information of the affected parties and information that pertained directly to them.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 2(1) (definition of personal information), 21(1)(a), 21(1)(f), 21(2)(f), 21(3)(b), 21(3)(g), 21(4)(d).

## **OVERVIEW:**

[1] The appellants are the parents of a young man who died in a boating accident in 2010. They submitted a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

On compassionate grounds, please release all records pertaining to the search/rescue efforts and the boating accident including all officer's notes, statements, reports, photographs of the scene, witness interview reports and the coroner's investigation statement and or post mortem examination.

On compassionate grounds please release any other records that I may not have mentioned that will help us understand the details around the death of our only son.

[2] In its decision, the ministry stated that it considered the above request under the provisions of the *Act* that permit the disclosure of personal information to the close relatives of deceased individuals where disclosure is desirable in the circumstances for compassionate reasons.

[3] In considering the circumstances of the request, the ministry indicated that it had contacted other individuals who provided information to the Ontario Provincial Police (OPP) during the course of the investigation and had sent out notification to 18 affected individuals (affected parties), of which eight replied, eight failed to reply, and two packages were returned to the ministry.

[4] The ministry then issued a decision, in which it granted access, in part, to the responsive records. The ministry denied access to the remaining records on the basis of the discretionary exemption at section 49(a) in conjunction with sections 14(1)(l), 14(2)(a) (discretion to refuse individual's own information/law enforcement), the mandatory exemption at section 21(1) and the discretionary exemption at section 49(b), with reference to sections 21(2)(f), 21(3)(a) and 21(3)(b) (personal privacy) of the *Act*. In addition, the ministry withheld some other information as it was not responsive to the request.

[5] The appellants appealed the ministry's decision.

[6] During mediation of the appeal, the ministry confirmed that three statements would be provided to the appellants as the affected parties to whom they relate had consented to disclosure.

[7] Also during mediation, both the appellants and the mediator attempted to contact several specified affected parties; however no additional consents were received.

[8] Finally, during mediation the appellants advised that they were not interested in pursuing any non-responsive information or any information that was severed pursuant to section 14(1)(l) of the *Act*. Accordingly, these two issues and the records to which they pertain are no longer before me for adjudication.

[9] Further mediation was not possible, and the appeal was forwarded to the adjudication stage of the appeal process.

[10] Subsequent to the transfer of the appeal to adjudication, the ministry issued a revised decision disclosing the statements of one of the individuals who had not responded earlier in the process. The ministry also provided to this office a letter from one of the individuals whose notification package had been returned to it. This individual declined to consent to disclosure.

[11] I sought representations from the ministry and thirteen affected parties, initially. Of the affected parties, I notified only those who did not consent and/or did not respond to the ministry's notice. The ministry submitted representations in response, and they were shared with the appellants in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[12] Of the thirteen affected parties notified, two responded to this office and indicated that they did not consent to disclosure. Another affected party responded to the Notice and provided her consent to the disclosure of her statement to the appellants. I did not share the brief representations of the two affected parties that responded with the appellants, as they reflect these individuals' personal concerns about disclosure. At a later date during the inquiry stage, three other affected parties provided consent to the disclosure of their statements to the appellants.

[13] In its representations, the ministry indicates that it has withdrawn its reliance on the discretionary exemption at sections 49(a), in conjunction with section 14(2)(a). Accordingly, these two exemptions were removed from the scope of the appeal.

[14] The appellants also submitted representations and they were shared with the ministry and the affected parties in accordance with the IPC's *Code of Procedure and Practice Direction 7*. In seeking reply representations, I indicated that the ministry and affected parties were to respond to the appellants' position that information relating to the death of their family member should be disclosed to them for compassionate reasons. Only the ministry and two affected parties replied. The ministry indicated that it was content to rely on its earlier representations.

[15] In this order, I have found that the records all contain the personal information of the deceased and other identifiable individuals. Only two records also contain the appellants' personal information. I have ordered the ministry to disclose certain information relating to the deceased and his activities just prior to the accident which resulted in his death and certain other information about the general circumstances of those events and the attempts that were made to rescue him. I have upheld the ministry's decision to withhold identifying information about the affected parties and information that pertains directly to them.

**RECORDS:**

<b>Pages</b>	<b>Record</b>	<b>Exemptions Applied</b>
Pages 4 and 8	Incident Report	21(2),(f), 21(3)(b), 49(b),
Pages 18-33, 39-43, 48-63, 70-77, 82-84	Statements	21(2)(f), 21(3)(a), 21(3)(b), 49(b)
Pages 87 and 88	officer's notes	21(2)(f), 21(3)(b), 49(b)
Page 115	officer's notes	21(2)(f), 21(3)(b), 49(b)
Pages 139, 140, 141, 142	officer's notes	21(2)(f), 21(3)(b), 49(b)

**ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) and/or the discretionary exemption at section 49(b) apply to the information at issue?

**DISCUSSION:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[17] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>1</sup>

[18] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[19] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>2</sup>

[20] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>3</sup>

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

[22] The ministry states that the records contain the personal information of 13 individuals who were interviewed by the OPP during their investigation into the matter. In particular, the ministry notes that the personal information includes their names, telephone numbers, addresses, and observations by or about them. The ministry submits that these individuals "will be identified if their personal information is disclosed, because the information being requested includes names, and telephone numbers."

---

<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

[23] In their representations, the appellants acknowledge that the records they are seeking may contain personal contact information of the affected parties. They indicate, however, that they are not interested in receiving contact information.

[24] Since the appellants state that they do not require contact information for the affected parties, this information is no longer at issue in this appeal. Nevertheless, the names and other personal information of the affected parties contained in the statements they gave to the OPP and the other records identified above are still at issue.

[25] Having reviewed the records at issue, I find that they all contain the personal information of the appellants' deceased son. The records also contain the personal information of the affected parties, including their names and other information about them such as dates of birth, information about their own activities on the day in question and their observations about others, including the deceased. In some cases, the personal information of the affected parties is so intertwined with that of other affected parties and the deceased that it is not severable.

[26] In other cases, however, these views or opinions of the deceased can be severed without revealing the personal information of the affected party, and therefore, the disclosure of any such information would not constitute the personal information of the affected party.<sup>5</sup>

[27] With the exception of the incident report<sup>6</sup> and one of the officer's notes,<sup>7</sup> the records at issue do not contain the personal information of any of the appellants. Although only a few pages of the occurrence report and officer's notes are at issue, upon reviewing these records in their entirety, I find that they contain small amounts of one of the appellants' personal information.

**B. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?**

[28] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[29] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

---

<sup>5</sup> section 2(1)(e).

<sup>6</sup> of which only pages 4 and 8 are at issue.

<sup>7</sup> of which only pages 87 and 88 are at issue.

[30] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[31] Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

[32] In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. Based on the evidence before me, it appears that only the exceptions at sections 14(1)(a) and (f) could apply. These sections state:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

***21(1)(a): consent***

[33] For section 21(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.<sup>8</sup>

[34] As I indicated above, a number of affected parties consented to disclosure of their personal information at the request and mediation stages of the appeal and the relevant records have been disclosed to the appellants. In addition, three individuals provided consent to this office during the inquiry stage of the appeal. Two of these affected parties provided written consents, one affected party provided verbal consent. Subsequent attempts to contact the affected party who verbally consented were unfruitful. Although I understand his wish to provide the appellants with his statement, without a written consent, I am unable to do so. I will, therefore, review the information about this individual in the same manner as the other affected parties who did not consent to disclosure.

---

<sup>8</sup> see Order PO-1723.



[35] However, the statements given by the two affected parties who provided written consents should be provided to the appellants in a similar manner to which previous statements were disclosed<sup>9</sup>. I will attach the statements given by these individuals to the copy of this order that I am sending to the ministry.

***21(1) and 49(b): unjustified invasion of personal privacy***

[36] The factors, presumptions and limitations in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1) or section 49(b). Section 21(2) sets out factors to consider in the analysis. The ministry initially claimed the presumption at section 21(3)(b) and the factor at section 21(2)(f) as the basis for withholding the personal information in the records. In its representations, the ministry added the presumption at section 21(3)(g) to certain personal information in the records. I will address these issues below.

[37] Once a presumed unjustified invasion of personal privacy under section 21(3) is established for records which are claimed to be exempt under section 21(1), it can only be overcome if section 21(4) or the "public interest override" at section 23 applies.<sup>10</sup>

[38] With respect to records claimed to be exempt under section 49(b), in *Grant v. Copley*,<sup>11</sup> the Divisional Court said the Commissioner could:

. . . consider the criteria mentioned in s.21(3)(b) in determining, under s.49(b), whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[39] If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 21 or 49(b). As I indicated above, the appellant has raised the application of section 21(4)(d) of the *Act*.

[40] Previous orders of this office have taken a "broad and all encompassing approach" in determining whether the disclosure of information is "desirable for compassionate purposes."<sup>12</sup> I have also taken this approach in the current appeal.

---

<sup>9</sup> I note on reviewing the records that were disclosed to the appellant, that the ministry has severed the personal information of other individuals referred to in the statements, such as their names and/or other information that would render these individuals identifiable. It appears that the appellants did not object to this manner of disclosure.

<sup>10</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

<sup>11</sup> *Grant v. Copley* [2001] O.J. 749.

<sup>12</sup> See: for example, Orders MO-2237, MO-2234, MO-2420, MO-2515 and PO-2850.

[41] I find that disclosure of some of the information at issue is desirable for compassionate reasons and, therefore, its disclosure does not constitute an unjustified invasion of the deceased's privacy or the privacy of the affected parties. I find further that the disclosure of other portions of the records at issue is not desirable for compassionate reasons in the circumstances of this appeal. I am satisfied that this information falls within the presumption at section 21(3)(b). I also find that the factor in section 21(2)(f) is relevant to this information. Accordingly, I find that the remaining information is exempt from disclosure pursuant to sections 21(1) and 49(b) of the *Act*. I have set out my reasons for these decisions below.

***21(4)(d) – compassionate reasons***

[42] This section states:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the disclosure is desirable for compassionate reasons.

[43] The term "close relative" is defined in section 2(1) of the *Act* as follows:

"close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; ("proche parent");

[44] The application of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?<sup>13</sup>

---

<sup>13</sup> Orders MO-2237 and MO-2245.

[45] Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the “circumstances” to be considered would include the fact that the personal information of the deceased is also the personal information of another individual or individuals. The factors and circumstances referred to in section 21(2) and the presumptions in section 21(3) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 21(4)(d).<sup>14</sup>

[46] After the death of an individual, it is that person’s spouse or close relatives who are best able to act in their “best interests” with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, “in the circumstances, disclosure is desirable for compassionate reasons.”<sup>15</sup>

*Parts one and two*

[47] The ministry states, and I concur, that the appellants fit within the definition of “close relative” as that term is defined above.

[48] With respect to whether the records contain the personal information of a deceased individual the ministry claims that although some of the records pertain to the deceased, “other records contain personal information that do not reference the deceased at all, but instead describe the events of the day before that preceded the tragic boating accident.”

[49] I find that the ministry’s characterization of the records is incorrect and too narrow. My review of the records reveals that every record at issue contains references to the deceased by name, and clearly describes the circumstances that surrounded his death. Even if I were to find that he was not clearly identified by name in a particular record, the records were created in the context of the boating accident and are clearly about the circumstances that led to his death. Accordingly, the deceased would be identifiable in this context, and the records would, therefore, be about him.

[50] The ministry’s representations appear to create a distinction between the events that occurred the day prior to the accident and the accident itself. In Order MO-2515 I noted the following comments made by Assistant Commissioner Brian Beamish in Orders MO-2237 and MO-2245, in which he found:

... by using the words “in the circumstances” the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is “desirable for compassionate reasons.” In my view, by enacting this amendment to the *Act*, the

---

<sup>14</sup> Order MO-2237.

<sup>15</sup> Order MO-2245.

Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members. It is recognized that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.

[51] With the purpose of the creation of the limitation at section 14(4)(c)<sup>16</sup> in mind, in Order MO-2525, I found that there was no temporal limit in the circumstances of that appeal, where the police involvement with a deceased individual had spanned approximately two weeks. In that case I found that "the records at issue contain information regarding the events surrounding the death that would assist family members in better understanding the death."

[52] In the current appeal, there is much less of a temporal span between the events of the previous day as described by witnesses and the accident that resulted in the young man's death. Moreover, the descriptions of the events that occurred the day before the accident are highly relevant to the circumstances of his death, and are, therefore, about him.

[53] Accordingly, I find that the first two parts of the test have been met.

### *Part three*

[54] In its submissions, the ministry indicates that it took a number of factors into consideration in determining that "no further disclosure of records would be desirable for compassionate reasons:"

- the affected parties did not consent to the disclosure of their personal information;
- the personal information is highly sensitive, with reference to section 21(2)(f) of the *Act* and was compiled as part of an investigation into a possible violation of law and its disclosure is presumed to constitute an unjustified invasion of privacy pursuant to section 21(3)(b);
- raised for the first time in its representations, the ministry claims that the presumption at section 21(3)(g) applies to portions of the records at issue because they "contain evaluations provided by witnesses of other individuals' behaviour";
- disclosure under the *Act* is potentially a disclosure to the world as there are no controls or restrictions on its use;

---

<sup>16</sup> The municipal equivalent to section 21(4)(d) in the *Act*.

- if individuals know that the personal information they provide to the police during a law enforcement investigation was going to be disclosed under the access process, they may be disinclined to co-operate with the police, which is an outcome that should be avoided in the interests of public safety and security; and
- the appellants have already been provided with most of the responsive records which contain detailed factual information of the circumstances of the deceased's death.

[55] The affected parties that responded to the Notice of Inquiry expressed concerns about the disclosure of their personal information for different reasons, including the possibility of legal issues arising from the matter, identity theft and personal and emotional issues that they are experiencing as a result of the tragedy.

[56] The appellants describe the last contacts they had with the deceased and the impact his death has had on their lives. In this regard, the appellants state:

He left Saturday [specified date] in the early afternoon and was to be home the next day...We spoke with him twice that Saturday, once to ensure he arrived safely and once around midnight before we went to bed to make sure he was safe. We only gave him permission to go because there was an adult supervising the party.

[57] The appellants acknowledge that they have been provided with some information about their son's death but claim that it has "not provided us with clarity regarding the circumstances of [the deceased's] death." Regarding their confusion with respect to the events that occurred just prior to the boating accident, the appellants state:

Some individuals who were at the cottage refused to talk to us regarding that weekend. Other individuals gave us verbal accounts of the weekend and then gave different verbal accounts to others, including some of our immediate family members. We are at a loss as to why [the deceased's] friends have withheld their statements or have given us conflicting information about the events of that day leading up to and including the events in the canoe. We have been very respectful of their privacy. We are only seeking the facts. We need the truth.

[58] The appellants point out several times in their submissions that some of the affected parties are unaware of their request as the Notices of Inquiry that were sent to them were returned as undeliverable. In addition, the appellants note that "some individuals did not bother to respond." The appellants take the position that in these cases there would not be an unjustified invasion in disclosure of the personal information of these individuals.

[59] The appellants maintain that they require the information at issue to help them in their grieving process. Recognizing that the records contain information about the other individuals at the party, they point out that they are only interested in information that "will assist us in understanding the events leading up to and surrounding the death of our son." Acknowledging the sensitivities of the matter with respect to the affected parties, the appellants state that "[r]efusing to release these records to us is causing us significant distress."

[60] The appellants conclude:

We vehemently disagree that 'no further disclosure of records would be desirable.' How can the ministry say that further disclosure of records would not be desirable for compassionate reasons? The Ministry cannot determine what information will help us find peace. The Ministry does not know that [the deceased] meant to us. The Ministry does not know what our lives have been like trying to cope with the loss of our son. The Ministry does not know what our despair looks and feels like. The Ministry has not been with us during our darkest of days. The Ministry has not been there to help us stand on our own feet when couldn't even bare to live another day without our dearest [deceased].

...

...we agree the records were collected under extreme circumstances, the death of a beloved young man. We have no intention of disclosing these documents to the world. There is no doubt that these young men and women were upset. Not to make their grief or trauma seem unimportant, but it in no way compares to our overwhelming grief and sorrow over the loss of [the deceased]...

[61] The circumstances surrounding the death of the appellants' son are tragic. While attending a party at a cottage the deceased went out in a canoe in the early hours of the morning. The canoe tipped over and the deceased drowned. The appellants are the parents of the deceased and have described the deep personal loss they have experienced as the result of this tragic accident. Although they acknowledge that they have been given some information relating to his death by the OPP, they have not been able to come to terms with his death, in part, because of the inconsistent information provided by many of the witnesses of what actually occurred during the day before his death and its tragic end.

[62] In Order MO-2237, Assistant Commissioner Beamish noted that one circumstance to consider in determining whether section 14(4)(c)<sup>17</sup> applies is the privacy of the deceased:

...it is noteworthy that section 2(2) of the *Act* provides that information about deceased individuals only ceases to be "personal information" after they have been dead for more than thirty years.

[63] With respect to the deceased's privacy interests, much of his personal information in the records consists of the observations of others about him and his activities during the day and evening. I note, however, that similar information has already been disclosed to the appellants by the ministry. It appears that the appellants are already aware, in a general sense, of what occurred during that period of time. I have taken this into account in considering the deceased's privacy interests.

[64] I have also considered the relationship between the deceased and the appellants and find that the closeness of their relationship carries significant weight. It is apparent that the deceased lived with his parents and that the appellants were actively involved in his life at the time of the accident.

[65] I am satisfied that the records at issue provide the information that the witnesses gave to the OPP during their interviews which occurred shortly after the accident, and that this information sheds some light on the deceased's circumstances shortly before his death. Accordingly, I give significant weight to this fact as it would assist the appellants in understanding and coming to terms with the events that gave rise to his death.

[66] I also give significant weight to the appellants' need for this information as part of their grieving process. I accept the appellants' argument that the information that has been disclosed has not provided them with clarity regarding the circumstances of death due to conflicting statements made informally by some of the witnesses.

[67] In weighing any privacy interests the deceased may have in the circumstances with the need for his parents to understand and come to terms with his death, I find that disclosure of the deceased's personal information is desirable for compassionate reasons.

[68] In addition to the above considerations pertaining to the appellants, I will consider the circumstances relating to the privacy interests of the affected parties.

---

<sup>17</sup> The municipal *Act* equivalent to section 21(4)(d).

[69] Section 21(2)(f) of the *Act* states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is highly sensitive;

[70] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>18</sup>

[71] I have no doubt that this tragic event has been a difficult time for the deceased's friends and others at the party or otherwise involved in the incident, and I agree with the ministry that disclosure of the personal information that is contained in their statements could reasonably be expected to cause them significant personal distress. Accordingly, I find that the factor in section 21(2)(f) is relevant in the circumstances of this appeal and I give it significant weight in the analysis.

[72] I also accept the position of the ministry that the presumption at section 21(3)(b) is applicable to the personal information at issue. This section provides:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[73] It is apparent on the face of the records that the personal information was collected by members of the OPP during their investigation into the cause of the boating accident "and for the purpose of ruling out any criminal wrongdoing." As noted in previous orders of this office, even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply, because the presumption only requires that there be an investigation into a possible violation of law.<sup>19</sup>

[74] In Order MO-2237, Assistant Commissioner Beamish commented on the weight to be given to this presumption in the circumstances of that appeal:

In arriving at my conclusion, I give moderate weight to the fact that the personal information of the affected party was provided to the Police in the context of a law enforcement investigation. I accept that the Police

---

<sup>18</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>19</sup> Orders P-242 and MO-2235.



advised the affected party that her interview would remain confidential and would only be used by the Police to assist in their investigation. However, I have also considered the fact that the affected party must have been aware that if the Police had determined that there was any evidence of "foul play" any agreement as to confidentiality she had with the Police would not have been enforceable. I give this consideration moderate weight in view of the fact that the law enforcement investigation has concluded and that the Police have found that the appellant's daughter died of natural causes.

[75] In my view, similar considerations are found in the current appeal and I agree with the Assistant Commissioner's views regarding the expectations of individuals who provide information to the police, particularly where a death has occurred. As in MO-2237, the law enforcement investigation in the current appeal has concluded and the OPP did not make any findings of criminal activity. In these circumstances, I also give moderate weight to the fact that the section 21(3)(b) presumption applies.

[76] I find that the presumption at section 21(3)(g) does not apply in the circumstances of this appeal. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,  
  
consists of personal recommendations or evaluations,  
character references or personnel evaluations;

[77] The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards, not to general observations, comments or opinions.<sup>20</sup> The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual.<sup>21</sup> This exemption has been found to apply, for example, to interview or test scores in job competitions.<sup>22</sup>

[78] Although the records at issue contain references made by certain individuals about other individuals, these references are merely observations made by these individuals and do not contain any formality that would be required for "assessments made according to measurable standards." Accordingly, I find that the presumption at section 21(3)(g) does not apply to the personal information at issue.

[79] With respect to the issues of consent and non-participation of certain affected parties in the appeal process, I find that non-consent by an affected party and the

---

<sup>20</sup> Orders PO-1756 and PO-2176.

<sup>21</sup> Order P-171.

<sup>22</sup> Orders P-722 and MO-1444.

reasons given for not consenting are factors to take into consideration in examining the circumstances in which disclosure for compassionate reasons is being considered. In particular, having found that the presumption at section 21(3)(b) weighs moderately, and the factor in section 21(2)(f) weighs heavily in favour of privacy protection, the concerns raised by the affected parties in this context are relevant to the final decision under section 21(4)(d), and I give their non-consent significant weight.

[80] The non-participation of a party in the appeal does not imply that the party has consented to disclosure of his or her personal information. Nor should it necessarily be taken as evidence that the individual does not retain a privacy interest in disclosure. In the circumstances of this appeal, I find that the non-participation of some of the affected parties, either because they could not be reached or because they chose not to participate is not a relevant consideration in balancing their privacy interests against the appellants' right to access.

[81] I am not persuaded that "disclosure under the *Act* is disclosure to the world" is a factor that should be given much weight in the circumstances of this appeal. This factor is implicit in any access decision made under the *Act*. In my view, the Legislature tacitly acknowledges the possible consequences of disclosure. As noted in Order MO-2237,

...the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is "desirable for compassionate reasons."... by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members.

[82] As I indicated above, the appellants have brought legal action against certain of the affected parties. In Order MO-2404, Adjudicator Bernard Morrow states "the prospect of legal action should not preclude the disclosure of personal information where it is otherwise desirable for compassionate reasons." It should be noted that in that case, the adjudicator's comments were made in the context of the timing of the appellant's raising of section 14(4)(c) issues. He went on to consider the circumstances where the deceased's personal information was intertwined with that of the affected parties. He found:

The question is whether the intrusion on the personal privacy of these affected parties is necessary and justified in order to provide the appellant with access to the deceased's personal information. In my view, it is not. However, I am satisfied that for the most part the deceased's personal information can be disclosed without compromising the personal privacy of the affected parties by simply removing all personal identifiers associated with the affected parties in the records. In my view, this

strikes a fair balance, allowing the deceased's family access to the deceased's personal information and the insight and understanding it seeks into the circumstances surrounding his death, while preserving the affected parties' personal privacy.

[83] Applying the reasoning in Order MO-2404 to the facts before me in Order MO-2515, I gave little weight to any use that the appellant in that case might put the information she received as a result of her access request, where the appellant had raised concerns about the actions taken by the police (a government institution).

[84] In the circumstances of the current appeal, the appellants are seeking the statements given by the individuals they have taken legal action against. I find that these circumstances are similar to those considered in Order MO-2404. Accordingly, I give significant weight to the fact that the appellants are suing certain affected parties, but only insofar as disclosure would reveal the identity of these particular affected parties and the personal information that pertains directly to them, and does not disclose information about the circumstances of the deceased's death.

[85] I recognize that the appellants wish to know as much as they can about the events of the evening before and the morning of the accident, and that they should be given as much of the deceased's personal information as possible. I am not persuaded that disclosing details relating solely to the affected parties, including the identities of each witness and the information provided by them or answers to questions about their own activities, unless this information also pertains to the deceased, is desirable for compassionate reasons. Even if the information about the deceased and another individual is not cleanly severable, I am not persuaded, in most cases, that disclosing the identity of another individual is necessary to assist the appellants in coming to terms with the circumstances of the deceased's death. I am satisfied that the relevant information about the deceased will be provided to them through the disclosures I am ordering in this decision.

[86] Having considered all the circumstances surrounding this access request and appeal, including the interests of the appellants in access to the requested information and the privacy interests of the deceased and the affected parties, I find that disclosure of information pertaining directly to the deceased and the circumstances of his death found in the records is "in the circumstances desirable for compassionate reasons," thus meeting the third part of the test.

[87] In my view, the information that pertains directly to the deceased and his actions during the relevant time period should be disclosed to the appellants. I am not persuaded that it is desirable to disclose personal information that relates solely to other individuals at the party or other witnesses that do not directly impinge on the circumstances of the deceased's death. The assistance this information would provide to the appellants is minimal in some cases and irrelevant in others and, based on my

analysis above, I find that its disclosure would constitute an unjustified invasion of privacy of the individuals to whom it pertains under sections 21 or 49(b).

[88] As I indicated above, some of the information pertaining to the deceased is severable from other information in the records and its disclosure would not reveal the identity of the individual providing the statement or any other individual. It is possible that some portions of the information may, by context or familiarity with the general circumstances, reveal something of a personal nature of another individual. It is likely that disclosure of certain information in the records may reveal something about everyone at the party as a group.

[89] With respect to the affected party who verbally consented, I note that the majority of the withheld information on pages 4 and 8 of the incident report and the officers' notes pertains to him. I find that simply removing this party's name and address is sufficient to de-identify him. Accordingly, the remaining information he provided to the OPP can be disclosed. A similar approach can be taken with the statement he gave to the police.

[90] In approaching the appeal in this way, I am satisfied that the information I have ordered the ministry to disclose to the appellants is sufficient for them to obtain information about and understand the circumstances regarding their son's death without encroaching significantly on the affected parties' privacy rights.

[91] I have provided highlighted copies of the records at issue to the ministry along with this order. The highlighted portions of these records should be disclosed to the appellants. I find that the remaining information in the witness statements is exempt under section 21(1) of the *Act*.

### **Exercise of discretion**

[92] The section 49 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[93] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[94] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>23</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>24</sup>

[95] The submissions provided by the ministry on its exercise of discretion under section 49(b) have been interspersed in its submissions on the other issues identified above, including the sensitivity of the information, the fact that it was provided in the context of a law enforcement investigation and in light of the fact that the ministry did take compassionate reasons into account in the approach it took and the disclosures it made at first instance.

[96] Taking the above submissions into account, I am satisfied that the ministry has properly exercised its discretion in the circumstances of this appeal and the information contained in the incident report and officer's notes is exempt under section 49(b).

**ORDER:**

1. I order the ministry to disclose the information that is highlighted on the copies of the records that I am sending to it along with this order, by providing the appellants with the severed records by **December 17, 2012** but not before **December 10, 2012**. I have also provided the ministry with a copy of the statements made by the two affected parties that consented during the inquiry stage. These statements should also be disclosed to the appellants in a manner similar to the previous disclosures the ministry has made at the same time the highlighted disclosures are made.
2. I uphold the ministry's decision to withhold the remaining information.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed pursuant to provision 1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ November 9, 2012

---

<sup>23</sup> Order MO-1573.

<sup>24</sup> section 54(2).